

Administrative Record

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VIII

999 18th STREET - SUITE 500

DENVER, COLORADO 80202-2405

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Ref: 8RC

MAY 15 1990

Jeffrey H. Desautels
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Site East HelenaFile # 2.06Confidential: Yes ☐ No ☒Admin. Record: Yes ☐ No ☒

Key Words/Comments: EPA's response
to ARCO's letters contending
no liability; no contact water
from zinc plant.

Copies to: Greg Mullen (MDHES)

Re: East Helena Superfund

Site Bob Raisch (MDHES)

Dear Mr. Desautels:

This letter responds to your letters of April 25, and April 26, 1990, concerning ARCO's liability for response costs incurred in connection with the East Helena Superfund Site (the "Site"). EPA's decision to issue a Special Notice letter to ARCO as a potentially responsible party for the Process Ponds Operable Unit is supported by information regarding: air emissions from the zinc smelter; Anaconda's discharge of wastewater to Lower Lake; and Anaconda's arrangement for treatment and disposal at Asarco's lead smelter.

Studies and tests conducted of soils and snow around East Helena indicate the presence of abnormally high concentrations of lead, arsenic, cadmium, zinc and copper. These high concentrations of metals decrease with distance from the Site. Studies performed by the Montana Air Quality Bureau, while the zinc plant was in operation, list the zinc plant as a primary source of the ambient lead and zinc, and to a lesser degree, other trace metals. Given the close geographic proximity of the Process Ponds to the zinc plant, contamination of the ponds from fallout is considered to be substantial. Based on available evidence, EPA has concluded that the zinc plant's air emissions alone are sufficient to establish ARCO's successor liability for the Process Ponds Operable Unit.

EPA has examined the engineering drawings and affidavits which ARCO contends support ARCO's assertion that Anaconda did not discharge contact cooling water into the process ponds. Water quality samples, however, reveal elevated concentrations of heavy metals in water being discharged from the zinc fuming plant into Lower Lake. Given these concentrations, and the relatively low levels of metals in Prickly Pear Creek above Lower Lake, EPA has concluded that the water being discharged from the zinc plant collected metals as it was run through the plant. Therefore, Anaconda's use of Lower Lake for disposal of wastewater containing hazardous substances is another independent basis for ARCO's liability since ARCO succeeded to the liability of Anaconda.

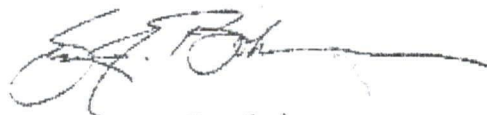
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On April 1, 1958, Anaconda entered into a contractual relationship with Asarco, whereby Anaconda delivered to Asarco for treatment certain residues and lead concentrates from its zinc concentrating plants elsewhere in Montana. Anaconda paid Asarco for this treatment, and for redelivery of the treated materials. Inherent in the contract for treatment was an arrangement for disposal of hazardous substances to the Process Ponds because wastewater from the treatment of materials sent to Asarco by Anaconda were disposed of in the ponds. Based on this arrangement, EPA has determined that ARCO may also be liable as a successor to the generator liability of Anaconda.

Underlying each of the above bases of liability is the fact that CERCLA imposes liability on successor corporations, and consequently, ARCO is liable for the past actions of Anaconda. In refuting this presumption, ARCO has relied upon a recent federal District Court decision which held that a successor corporation is not liable under CERCLA because Congress did not specify successor corporations in the definition of "persons" in Section 101(21) or the list of potentially responsible parties in Section 107(a) of CERCLA. 42 U.S.C. 9601(a), 9607(a). This decision is contrary to the weight of authority, to considerations of statutory purpose, and to the legislative history that have guided all other courts addressing the issue. Recognition of successor liability is consistent with the remedial nature of CERCLA and is essential to its effective implementation. A ruling, such as the district court's, which allows a polluting corporation to merge with or be taken over by another corporation and thereby avoid its obligation to clean up the environment, cannot be reconciled with the underlying goals and objectives of CERCLA.

EPA has reviewed ARCO's recent submittals and the arguments advanced by ARCO at our meeting of May 14, 1990. However, EPA's determination that ARCO is a potentially responsible party for the Process Ponds Operable Unit at the East Helena Site has not changed for the reasons cited above. Technical questions about this matter should be directed to D. Scott Brown, Remedial Project Manager, U.S. EPA, Federal Building, 301 South Park, Drawer 10096, Helena, Montana 59626, (406) 449-5414. Legal questions should be directed to me at: Office of Regional Counsel, EPA Region VIII, 999 18th Street, Suite 500, Denver, Colorado 80202, (303) 294-1458.

Sincerely,



Suzanne J. Bohan
Assistant Regional Counsel

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cc: Mr. Scott Brown, EPA, 8MO
Michael Goodstein, DOJ
Nancy Mangone, EPA-HQ, LE-134S
Robert W. Lawrence